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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 282

BONWIT TELLER & COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JULY 9, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(35,204)

(35,204)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 14, 1930

[fol. 1]

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 282

BONWIT TELLER & COMPANY, Petitioner,

against

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Bonwit Teller & Company respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

The question involved is whether, in an action to recover an overpayment of tax, claim, for which was duly allowed by the Commissioner of Internal Revenue and evidenced by his certificate to that effect, the action of the Commissioner in allowing the claim is binding upon the United States where neither fraud nor mistake is asserted.

The petitioner's income tax return for the fiscal year ended January 31, 1919 was filed on or about the 14th day of July 1919 (Special finding 3). Thereafter upon audit [fol. 2] of the return the Commissioner found and so advised the taxpayer under date of November 19, 1924, that its tax had been overassessed in the sum of $10,866.43 (Special finding 4). The period of limitation then in effect had run against the allowance of a refund, but the statute was subsequently amended (Act of March 3, 1925; 43 Stat. 1115) so as to permit such allowance.

In accordance with that amending act, on May 16, 1925, the Commissioner wrote the taxpayer that the refund could not be allowed "unless an income and profits tax waiver is

filed on or before June 15th, 1925." Thereupon, on May 22, 1925, the taxpayer filed the required waiver, with a letter saying, "In accordance with your request, we enclose you herewith waiver." (Special finding 5). Still later, on February 9, 1927, the Commissioner again wrote taxpayer in respect to the matter, requesting a formal claim executed on the departmental Form 843. This form duly executed was filed on or about February 19, 1927 (Special findings 6-8). The Commissioner treated the waiver and letter of May 22, 1925, in connection with the prior correspondence and proceedings, as an informal or defective claim for refund, perfected by the formal claim on Form 843, and allowed the claim in the amount of $10,866.43. (Special findings 9-10). On or about March 8th, 1927, the Commissioner duly approved and scheduled to the Collector of Internal Revenue a certificate of overassessment No. 990988 in petitioner's favor, and on or about May 12, 1927 caused the original certificate to be delivered to the petitioner (Special finding 11). A copy of that certificate was annexed to the petition in the Court below as Exhibit (A)."

[fol. 3] The Collector of Internal Revenue, after receiving the certificate of overassessment, certified the same as an overpayment by the petitioner for its fiscal year ended January 31, 1919. He thereafter credited $9,846.06 of the amount allowed on the schedule against additional tax assessed for 1917 and a check for $1,462.99, which included the balance of the overassessment of $1,020.37 and interest thereon in the amount of $442.62, was subsequently issued in favor of the petitioner (Special finding 11). The petitioner refused the check and never presented it for payment but has held it in its possession and has offered to apply it upon its claim, if the defendant so desired and agreed, and duly protested against the application of any part of the refund upon its tax for the year 1917 on the ground that the said tax for 1917 was barred by the Statute of Limitations (Special finding 11).

Petitioner brought this suit in the Court of Claims to recover the entire amount of the overpayment determined and allowed by the Commissioner of Internal Revenue. The United States filed a general traverse but subsequently and after the completion of the testimony and filing of

petitioner's brief, by permission of the Court, filed a counterclaim seeking to recover the said sum of $1,402.99, the balance remaining after the deduction of the taxes of 1917. The United States later abandoned its claim of right to deduct the taxes of 1917 from the amount of the overpayment for 1919, perforce of decisions in Bowers vs. New York & Albany Lighterage Co., 273 U. S. 346; Peerless Paper [fol. 4] Box Mfg. Co. vs. Routzahn, 22 Fed. (2d) 459; and Brady vs. U. S., 24 Fed. (2d) 205; and Section 1106 of the Revenue Act of 1926; and sought to defeat recovery by an attack upon the Commissioner's allowance of the claim, asserting for the first time that a proper claim for refund had not been filed and that therefore the Commissioner erred in his determination.

Treasury Department Regulations (T. D. 4265-6) provide that if an informal or defective claim was filed it could be perfected by a formal claim if the latter was filed on or before May 9, 1929.

The questions in dispute are:

1. Whether the Commissioner's determination of the overpayment and the allowance of the claim are binding upon the United States where neither fraud nor mistake is asserted.

And if that question be answered in the negative,

2. Whether the Commissioner's determination that the documents on file with him on May 22, 1925 constituted an informal claim for refund, was erroneous in law.

The Court of Claims by a divided vote of three to two held that the determination of the Commissioner was not final and conclusive and that his allowance of the claim was erroneous in law.

B

Reasons Relied on for the Allowance of the Writ

1. The decision of the Court of Claims in this case is directly in conflict with decisions of this Court and with a long line of decisions of the lower Court.

[fol. 5] U. S. vs. Savings Bank, 104 U. S. 728;
U. S. vs. Kaufman, 96 U. S. 567;
First National Bank of Greencastle vs. U. S., 15 Ct. Cls. 225;

Woolner vs. U. S., 13 Ct. Cls. 355;
Savings Bank of Pittsburgh vs. U. S., 16 Ct. Cls. 335;
Nixon vs. U. S., 18 Ct. Cls. 448;
Sybrandt vs. U. S., 19 Ct. Cls. 461.

2. The case involves an important question of statutory construction—whether under Section 3220 of the United States Revised Statutes (now Section 149, Title 26 of the United States Code) the determination of the Commissioner of Internal Revenue that there has been an overpayment of tax and his allowance of the claim therefor, are binding and conclusive upon the United States, in the absence of mistake or fraud; or whether such determination and allowance may be reviewed and repudiated by the Department of Justice or by other departments or officers of the United States.

3. The Court of Claims erred in holding that it had power to review the allowance by the Commissioner of Internal Revenue and to determine the sufficiency of the claim for refund filed by the petitioner, no fraud or mistake being claimed.

4. The Court of Claims erred in holding as a matter of law that the claim for refund filed with the Commissioner of Internal Revenue was insufficient in law.

5. The Court of Claims erred in dismissing the petition.

Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims of the United States, commanding that Court to certify and to send to [fols. 6 & 7] this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. H-554, Bonwit Teller & Company vs. United States, and that the said judgment of the Court of Claims may be reviewed by this Honorable Court and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Bonwit Teller & Company, by Arthur B. Hyman,
Counsel for Petitioner.

[fol. 1-a] IN UNITED STATES COURT OF CLAIMS

H-554

BONWIT TELLER & Co., Petitioner,

against

UNITED STATES, Respondent

I. PETITION—Filed Dec. 27, 1927

To the Honorable the Court of Claims:

The petitioner above named, Bonwit Teller & Co., by its attorneys, Paskus, Gordon & Hyman, respectfully shows and alleges:

For A First Cause of Action

One. That your petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at No. 417 Fifth Avenue, in the Borough of Manhattan, City of New York.

Two. That your petitioner has and at all the times hereinafter mentioned, had, in conformity with the rules and regulations adopted by the Commissioner of Internal Revenue, and in accordance with the statutes in such cases made and provided, established its fiscal year as beginning February 1st, and ending January 31st.

Three. That in accordance with the statute in such case made and provided, your petitioner duly prepared and duly [fol. 2-a] filed its income tax return for the fiscal year ended January 31, 1919, and paid to the Government of the United States, through its Collector of Internal Revenue for the Third District of New York, the sum of $57,871.16, as a tax upon the taxable income reported in said return.

Four. That thereafter and on or about the 19th day of November, 1924, the Commissioner of Internal Revenue wrote your petitioner certifying, among other things, that your petitioner had made an overpayment of tax for the said fiscal year ended January 31, 1919, in the sum of Ten thousand eight hundred sixty-six and 43/100 ($10,866.43) Dollars.

Five. That thereafter, and on or about the 12th day of May, 1927, upon a claim for the refund of said overpayment the Commissioner of Internal Revenue duly delivered to your petitioner a certificate of overassessment by which it certified that a refund was due your petitioner in the said sum of $10,866.43. A copy of said certificate of overassessment is annexed hereto marked Exhibit "A" and made a part hereof.

Six. That simultaneously with the delivery of said certificate of overassessment, the Commissioner of Internal Revenue tendered to petitioner a check for the amount of said refund, with interest, less the sum of $9,846.06, which sum the Commissioner of Internal Revenue claimed represented an additional tax found by him to be due from petitioner for the fiscal year ended January 31, 1917.

Seven. That said alleged additional tax for the year ended January 31, 1917, was barred by the statute of limitations and was not a proper offset to petitioner's claim to a refund of an overassessment for the fiscal year ended January 31, 1919.

[fol. 3-a] Eight. That your petitioner has rejected said check and refused to accept said tender.

Nine. That by reason of the foregoing, respondent has received from your petitioner for the use and benefit of your petitioner, the sum of $10,866.43.

Ten. That no part of said sum has been paid although payment of same has been duly demanded.

Eleven. That no other action, suit or process is pending for or in respect to petitioner's claim in any other court against any person acting or professing to act mediately or immediately under the authority of the United States; that no person other than your petitioner is the owner of said claim, or interested therein; that no assignment or transfer of said claim or any part thereof or interest therein has been made; that your petitioner is justly entitled to the amount herein claimed from the United States of America after allowing all just credits and offsets; that your petitioner has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily, aided, abetted or given encouragement to rebel-

lion against the said Government; that your petitioner is a citizen of the United States and believes the facts as stated in this petition to be true.

For a Second Cause of Action

Twelve. Petitioner repeats and re-alleges, as a part of this cause of action, each and all of the allegations contained in the paragraphs "One," "Two," "Three," "Four" and "Eleven" contained in the first cause of action with like effect as if herein fully alleged, and incorporates herein all the allegations therein set forth.

Thirteen. That thereafter and on or about the 12th day of May, 1927, respondent, acting through the Commissioner [fol. 4-a] of Internal Revenue rendered a statement to your petitioner that petitioner's correct tax liability for its fiscal year ended January 31, 1919, was $47,004.73, and upon which statement the sum of $10,866.43 was actually found and agreed to be due to your petitioner by reason of the aforesaid overassessment. That a copy of said statement is hereto annexed marked Exhibit "A" and made a part hereof.

Fourteen. That respondent, acting through the Commissioner of Internal Revenue, then and there promised and agreed to pay said sum to your petitioner, but no part of said sum has been paid, although the payment of same has been duly demanded.

Wherefore petitioner prays judgment against respondent in the sum of Ten thousand eight hundred sixty-six and 43/100 ($10,866.43) Dollars, with interest thereon, from the 10th day of July, 1919, together with the costs and disbursements of this action.

Paskus, Gordon & Hyman, Attorneys for Petitioner,
Office & P. O. address; 2 Rector Street, Borough of Manhattan, City of New York.

[fol. 5-a] EXHIBIT "A" TO PETITION

Treasury Department, Office of Commissioner of Internal Revenue, Washington

Income Tax Unit

Certificate of Overassessment

IT:C:CC.

Number: 990988. Allowed: $10,866.43. Schedule No. 24417.

May 12, 1927.

Bonwit Teller and Company, 417 Fifth Avenue, New York, New York.

SIRS: An audit of your income tax return, Form 1120, and a consideration of all the claims (if any) filed by you for the fiscal year ended January 31, 1919, indicates that the tax assessed for this year was in excess of the amount due:

Tax assessed:	
Original 41208	$57,871.16
April 1924, Special 2, P. O., L. O.	167,294.59
Total assesses	$225,165.75
Less: Previously allowed, Schedule IT:A—14872	167,294.59
Net assessment	$57,871.16
Correct tax liability	47,004.73
Overassessment	$10,866.43

This refund (or credit) is made in accordance with the provisions of Section 284 (g) of the Revenue Act of 1926. [fol. 6-a] The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

Abated: $——.
Credited: $9846.06.
To Tax. Year 1917—Mar. Wash. #3046—1923L.
Credited: $——.
To Tax. Year.
1020.37.
Refunded: $——.
Interest: $442.62.

Frank K. Bowers, Collector of Int. Rev. Second Dist. of N. Y. City.

Respectfully, C. R. Nash, Assistant to the Commissioner, by H. B. Robinson, Head of Division.

Instructions executed.

NOTE—The interest, if any included herein is taxable income, and must be included in your income tax return for the year in which received.

[fol. 7-a] *Duly sworn to by Fred A. Taylor. Jurat omitted in printing.*

[fol. 8] II. GENERAL TRAVERSE—Filed Feb. 4, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

A. H. McC.

[fol. 9] III. COUNTERCLAIM—Filed May 24, 1929, by Leave of Court

Now comes the defendant, and by leave of Court first had and obtained, files a counterclaim supplemental to its general traverse heretofore filed. Further answering the petition of the plaintiff, the defendant alleges as follows:

On July 14, 1919, the plaintiff filed its income and excess-profits tax return for the fiscal year ended January 31, 1919, reporting a tax due of $57,871.16, which said sum was paid to the defendant in two installments as follows:

July 14, 1919	$28,935.58
December 13, 1919	28,935.58

The Commissioner of Internal Revenue, on or about November 19, 1924, determined that the plaintiff's correct tax liability for said fiscal year was $47,004.73 and that plaintiff had overpaid its tax for said fiscal year in the amount of $10,866.43. No claim for refund having been duly filed [fol. 10] by plaintiff, the Commissioner was without authority to refund said amount, and plaintiff was so advised.

On March 3, 1925, Section 281 (e) of the Revenue Act of 1924 (43 Stat. 253, 302) was amended to read as follows:

If the taxpayer has on or before June 15, 1925, filed such a waiver, in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. (43 Stat. 1115).

On March 23, 1925, the plaintiff filed the waiver provided for by the 1924 Act as amended. On February 19, 1927, plaintiff filed formal claim for refund of said $10,866.43, which amount had been determined to have been an overpayment.

On March 4, 1924, the Commissioner of Internal Revenue duly approved and scheduled the certificate of overassessment for said $10,866.43 and said certificate of overassessment was delivered to plaintiff. Subsequently, and by check dated May 12, 1927, the sum of $1,462.97 was paid to plaintiff, which said sum consisted of $1,020.37 as overpayment of tax and $442.62 as interest on the overpayment.

The authorization and direction to refund to plaintiff the said sum was in excess of the power of the said Commissioner in that no valid claim for refund had been duly filed [fol. 11] by plaintiff within the period prescribed by the law.

Wherefore, the defendant prays that plaintiff's petition be dismissed and that defendant enter judgment against

the plaintiff in the sum of $1,462.97, plus interest thereon from May 12, 1927.

Respectfully submitted.

Herman J. Galloway, Assistant Attorney General. George H. Foster, Attorney. Frank J. Ready, Jr., Special Attorney, Bureau of Internal Revenue.

[fol. 12] IV. REPLICATION TO COUNTERCLAIM—Filed December 7, 1929, by Leave of Court

Comes now the petitioner and for replication to the counterclaim filed by the defendant herein alleges:

It admits that the plaintiff duly filed its Income and Excess Profits return for the fiscal year ended January 31, 1919, tax due of $57,871.16 and duly paid the tax thereon, and thereafter, and on or about the 19th day of November, 1924, the Commissioner of Internal Revenue determined that the plaintiff's correct tax liability for the said fiscal year was $47,004.73.

It admits that on March 23rd, 1925, plaintiff filed a waiver as alleged in said counterclaim.

That on March 4th, 1924, the Commissioner of Internal Revenue approved and scheduled a certificate of over-assessment in favor of the petitioner in the sum of $10,866.43 and delivered the said certificate to the plaintiff; subsequently, and on or about May 12th, 1927, the Commissioner of Internal Revenue tendered to the plaintiff a check in the sum of $1,462.97 which was arrived at by deducting from the sum of $10,866.43 the sum of $9,846.06 which said Commissioner claimed represented an additional tax found to be due for the fiscal year ended January 31st, 1917, which said tax and the collection thereof was and is barred by the Statute of Limitations in such cases made and provided, and the petitioner alleges that said check was neved accepted by it and that the sum represented thereby has never been paid to it.

The petitioner denies each and every of the allegations of the counterclaim not herein or in said petition specifically admitted and reiterates and realleges each and every of the allegations in said petition contained.

[fol. 13] Wherefore the petitioner demands judgment dis-

missing the counterclaim and for judgment as prayed for in the petition.

Respectfully submitted.

Arthur B. Hyman, Attorney for Plaintiff. Office & P. O. Address: Two Rector Street, Borough of Manhattan, New York City.

To Herman J. Galloway, Assistant Attorney General; Clerk of the Court of Claims of the United States.

Duly sworn to by Walter B. Bonwit. Jurat omitted in printing.

[fol. 14] V. Argument and Submission of Case

On February 11, 1930, this case was argued and submitted on merits by Mr. Arthur B. Hyman, for plaintiff, and by Mr. Geo. H. Foster, for defendant.

VI. Special Findings of Fact, Conclusion of Law, Opinion of the Court by Green, J., and Dissenting Opinion by Littleton, J.—Filed April 14, 1930.

Mr. Arthur B. Hyman, for plaintiff.

Mr. George H. Foster, with whom was Mr. Assistant Attorney General Herman J. Galloway, for defendant. Mr. Frank J. Ready, Jr., was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special Findings of Fact

1. The plaintiff, Bonwit Teller & Co., is a corporation engaged in the business of selling feminine wearing apparel at retail. During the years involved in this action, plaintiff has established its fiscal year as beginning February first and ending January thirty-first.

2. On May 17, 1918, the plaintiff filed its income and profits tax return for its fiscal year ended January 31, 1917, and seasonably paid the taxes therein reported. On February 14, 1923, the plaintiff and the Commissioner of Inter-

nal Revenue executed a written agreement which operated to extend the period of limitation for determination, assessment, and collection of 1917 income taxes until April 1, 1924. No other or further waiver was ever executed with respect to that taxable period.

On March 28, 1923, the Commissioner of Internal Revenue made an additional assessment of $11,057.57 against the plaintiff for the fiscal year ended January 31, 1917. A portion of that assessment was subsequently abated, leaving a balance of $9,846.06 outstanding on the records of the collector. The plaintiff has paid no part of that balance and no suit or proceeding for the collection thereof has been instituted against it.

3. The plaintiff on or about July 14, 1919, filed its corporation income and profits tax return for the fiscal period begun February 1, 1918, and ended January 31, 1919, reporting $57,871.16 as the tax due upon its reported taxable income. The tax was paid by the plaintiff to the Government of the United States through its collector of internal revenue for the third district of New York; $28,935.58 of the said tax was paid on July 14, 1919; the remaining $28,935.58 was paid on December 13, 1919.

Pending the audit and review of the plaintiff's income and profits tax return for the fiscal period ended January 31, 1919, the Commissioner of Internal Revenue determined the plaintiff's total tax liability for that period to be $225,165.75 instead of $57,871.16 as returned, and in April, 1924, made a jeopardy assessment against the plaintiff for the difference of $167,294.59. No part of that additional assessment was paid, and on or about May 22, 1924, the plaintiff [fol. 15] filed a claim for abatement of the full amount thereof. The claim was thereafter allowed in full, as will hereinafter be related.

4. While the aforesaid claim for abatement was under consideration, and prior to its formal allowance, the Acting Deputy Commissioner of Internal Revenue addressed a letter to plaintiff under date of November 19, 1924, relating to the income tax liability of the plaintiff and its Massachusetts subsidiary company for the years 1919, 1920, and 1921, containing a schedule showing the manner in which the Internal Revenue Bureau had computed the tax for the plaintiff's fiscal year ending January 31, 1919, and a total over-

assessment of $178,161.02, from which a deduction was made of $10,866.43, leaving the amount overassessed for said fiscal year at $167,294.59.

In connection therewith it was further stated in explanation of the deduction:

"Inasmuch as the provisions of section 281 of the revenue act of 1924 have not been complied with regard to the full amount of the above overassessment, a portion in the amount of $10,866.43 can not be allowed."

The plaintiff was informed that a certificate of overassessment would be issued through the office of the collector of internal revenue for its district and would be applied by that official in accordance with the provisions of section 281 (a) of the revenue act of 1924.

The Commissioner of Internal Revenue subsequently allowed in full the plaintiff's claim for abatement of the additional 1919 assessment of $167,294.59 hereinbefore referred to, and duly issued and scheduled to the collector of internal revenue a certificate of overassessment, No. 715-402, in the plaintiff's favor for the said sum.

5. On December 11, 1926, Arthur B. Hyman, of Paskus, Gordon & Hyman, counsel for the plaintiff, addressed the following letter to C. R. Nash, assistant to the Commissioner of Internal Revenue:

"Under date of November 19th, 1924, you determined an apparent deficiency in tax against the above-named company for the years ended January 31st, 1918 to 1921, inclusive. Additional taxes were found to be due in the years 1918, 1920, and 1921. In the year 1919 you found an overpayment of tax in the sum of $10,866.43. (Page 5, Schedule 10.) You certified that inasmuch as section 281 of the revenue act of 1924 had not been complied with, the amount which would otherwise have been refundable—that is, $10,866.43—could not be refunded.

"Subsequently, under date of May 16th, 1925, you wrote to the taxpayer as follows:

" 'An examination of your income-tax return for the year ended January 31st, 1919, discloses an apparent overassessment of tax for the year. It appears that the overassessment can not now be allowed, due to the limitation of time for allowance thereof, provided by section 281 of the

revenue act of 1924, unless an income and profits tax waiver is filed on or before June 15th, 1925, as provided by an act of Congress dated March 3, 1925, amending section 281 E of the revenue act of 1924. Two waver forms are therefore enclosed in order that you may, if you desire, execute and forward one of the forms to this office.'

"On May 22nd we wrote to you as follows:

[fol. 16] " 'J. G. Bright, Esq., Deputy Commissioner of Internal Revenue, Washington, D. C.

" 'DEAR SIR: In accordance with your request, we enclose you herewith waiver.'

"Since that time we have heard nothing further from you and there has been no refund made to the taxpayer.

"In this connection we desire particularly to emphasize the fact that you yourself discovered the overpayment of taxes for the year in question in connection with the audit of the taxpayer's return. It is your custom in such cases to make immediate refund, that is to say, if there are available appropriations for that purpose. In your letter no suggestion was made that anything further was necessary than the filing of the waiver, which was very promptly done.

"A protest was filed by the taxpayer covering the year in question and a certificate of overassessment, No. 715402, Schedule No. 14872, was issued.

"It goes without saying, of course, that your office desires that every taxpayer should be accorded that to which he is entitled, and we presume, therefore, that you will see that such a disposition is made of this case."

6. The waiver referred to in the finding next preceding was received by the Bureau of Internal Revenue on May 23, 1925, and accepted in writing by the commissioner.

7. On February 9, 1927, C. R. Nash, assistant to the Commissioner of Internal Revenue, addressed the following letter to counsel for the plaintiff:

"Further reference is made to your letter dated December 11, 1926, relative to the income-tax account of Bonwit Teller & Company, New York, New York, for the fiscal year ended January 31, 1919.

"In this connection you are advised that, in order that the allowance of the overassessment may be made you are

requested to file with this office a claim on the enclosed Form 843 setting forth the basis of the adjustment, making reference in your reply to IT:C:CC:3:OTA."

On February 17, 1927, the following letter was sent to Mr. Nash:

"In accordance with your letter of February 9th, 1927, we enclose herewith for filing, claim for refund in the sum of $10,866.43, of Bonwit Teller & Co., on Form 843."

8. The plaintiff's claim for refund of $10,866.43 made out on Form 843 was received by and duly filed in the Bureau of Internal Revenue on or about February 19, 1927. The plaintiff alleged that it believed its application for refund should be allowed "for the reasons stated in letter of C. B. Allen, acting deputy commissioner, dated November 19, 1924, containing the symbols IT:CR:A:JML—addressed to the taxpayer, a copy of which is hereto annexed and made a part hereof."

9. On or about February 5, 1927, H. B. Robinson, head of the consolidated returns audit division of the Income Tax Unit, approved and recommended for allowance a proposed certificate of overassessment, No. 990988, showing overassessment and overpayment of $10,866.43 under the plaintiff's original income-tax return for the fiscal year ended January 31, 1919. The record of the case was then checked [fol. 17] in the claims control section of the clearing division, to determine whether the plaintiff had filed a claim for refund prior to the expiration of the period of limitation applicable thereto. It was there determined with the approval of Mr. W. T. Sherwood, then head of the clearing division and now the Assistant Deputy Commissioner of the Income Tax Unit, that the documents on file, which included the bureau's audit letter of November 19, 1924, the bureau's letter to plaintiff of May 16, 1925, inviting a waiver and the reply made by plaintiff's counsel dated May 22, 1925, enclosing and filing the suggested waiver, would be treated by the bureau as an informal claim for refund filed May 23, 1925.

10. The letter dated May 22, 1925, returning the waiver properly executed by the plaintiff, which had been sent to it by the commissioner, was received and filed by the Bu-

reau of Internal Revenue on May 23, 1925. The Bureau of Internal Revenue indorsed upon the letter returning the waiver as follows: "Inferential demand for the refund upon basis of the schedule sent taxpayer under date of November 19, 1924 (IT:CR:A:JML). Rules and Regulations. Mulligan." This indorsement was not dated. A further indorsement appears upon this letter as follows: "Approved by Mr. Mulligan and Mr. Sherwood for scheduling as is. O. Allen. 4/4/27."

On February 5, 1927, the bureau executed another certificate of overassessment for $10,866.43 and the following certifications appear upon the margin of the bureau's record copy of overassessment:

"Waiver filed May 23, 1925. Informal claim for refund filed May 23, 1925, with waiver perfected by claim Form 843. (Signed) O. Allen, 3/4/27."

"Claim for refund filed May 23, 1925, waiver filed May 23, 1925."

"This C. of O. approved for scheduling as is by W. T. S. (Signed) O. Allen, 4/4/27."

11. The Commissioner of Internal Revenue thereafter allowed the plaintiff's claim for refund in the amount of $10,866.43 and on or about March 8, 1927, duly approved and scheduled to the collector of internal revenue a certificate of overassessment, No. 990988, in the plaintiff's favor, and on or about May 12, 1927, caused the original certificate to be delivered to the plaintiff. A copy of the said certificate of overassessment is annexed to the petition of the plaintiff as its Exhibit A and is made a part hereof by reference. The collector of internal revenue after receiving the certificate of overassessment, certified the same as an overpayment by the plaintiff for its fiscal year ended January 31, 1919. He thereafter credited $9,846.06 of the amount allowed on the schedule against the additional tax assessed for 1917, referred to in Finding 2 hereof, and a check for $1,462.99, which included the balance of the overassessment of $1,020.37 and interest thereon in the amount of $442.62, was subsequently issued in favor of the plaintiff. The plaintiff has never presented said check for payment but has held it in its possession and has offered to apply it upon the claim involved herein if the defendant so desired and agreed, and the plaintiff has protested against the application of any

part of this refund upon its tax for the year 1917 on the ground that said tax was barred by the statute of limitations.

[fol. 18] CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is therefore dismissed.

The court further decides, as a conclusion of law, that the defendant is not entitled to recover on its counterclaim, and the counterclaim is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

OPINION

GREEN, Judge, delivered the opinion of the court:

The plaintiff brings this suit to recover the amount of a refund alleged to be due from defendant on taxes paid by plaintiff for the fiscal year 1919. The defendant alleges that no claim for refund was filed until after the expiration of the period of limitations, and by way of counterclaim also alleges that part of the amount claimed by plaintiff was wrongfully paid to it and defendant therefore is entitled to judgment for the amount so paid.

The evidence shows without dispute that plaintiff made its return for the year 1919 and paid taxes accordingly, but the commissioner assessed $167,294.59 in addition thereto. The plaintiff filed a claim for abatement of the amount of this additional assessment which was allowed, and in recomputing the tax the commissioner found that the plaintiff had been overassessed $10,866.43. The plaintiff was notified of this overassessment about November 19, 1924, and at the same time was advised that—

"Inasmuch as the provisions of section 281 of the revenue act of 1924 have not been complied with regard to the full amount of the above overassessment, a portion in the amount of $10,866.43 can not be allowed."

Later the section above referred to having been amended, the commissioner, on May 16, 1925, wrote plaintiff that—

"An examination of your income-tax return for the year ended January 31st, 1919, discloses an apparent overassessment of tax for the year. It appears that the overassessment can not now be allowed, due to the limitation of time for allowance thereof, provided by section 281 of the revenue act of 1924, unless an income and profits tax waiver is filed on or before June 15th, 1925, as provided by an act of Congress dated March 3, 1925, amending section 281 E of the revenue act of 1924. Two waiver forms are therefore enclosed in order that you may, if you desire, execute and return one of the forms to this office."

In response to this letter, the plaintiff, on May 23, 1925, mailed to the commissioner a waiver which was duly accepted by the commissioner. Nothing further was done until December 11, 1926, when plaintiff's counsel wrote a letter to the commissioner calling attention to the proceedings which have been above recited and the letters to which reference has been made, stating in substance that it was [fol. 19] the custom in such cases to make immediate refund, and that in the letter of the commissioner there was no suggestion that anything further was necessary than the filing of the waiver, and concluding with a statement to the effect that it would be expected the taxpayer would receive that to which it was entitled. On February 9, 1927, a letter was written by the commissioner to counsel for plaintiff requesting that a claim be filed on the form enclosed in order that the overassessment might be allowed and in response thereto a claim for refund of $10,866.43 was filed with the bureau about February 19, 1927. Prior to the filing of this claim for refund, about February 5, 1927, the head of the consolidated returns audit division of the Income Tax Unit approved and recommended for allowance a certificate of overassessment and overpayment of $10,866.43 under the plaintiff's original income tax return for the fiscal year ending January 31, 1919. The record of the case was thereupon checked in the claims control section of the clearing division to determine whether the plaintiff had filed a claim for refund prior to the expiration of the period of limitation applicable thereto and it was deter-

mined with the approval of Mr. W. T. Sherwood, the head of the clearing division, that the documents on file, which included those to which reference has been made hereinabove, would be treated by the bureau as an informal claim for refund filed May 23, 1925. Notations were made on the bureau's record copy of the proposed certificate of overassessment to the effect that an informal claim for refund had been filed May 23, 1925, with waiver perfected by claim Form 843. This bore the signature "O. Allen," with this further notation as follows: "This C. of O. approved for scheduling as is by W. T. S. (Signed) O. Allen." After these proceedings the Commissioner of Internal Revenue allowed plaintiff's claim of refund and approved and scheduled to the collector of internal revenue a certificate of overassessment in plaintiff's favor. Thereafter the commissioner credited $9,846.06 of the amount allowed on the schedule on taxes due for 1917 and sent plaintiff a check for $1,462.99, which included the balance of the overassessment and interest thereon. This check has never been presented by plaintiff and as the taxes upon which the credit was made were at the time barred by the statute of limitations, the action of the commissioner in making this credit makes no defense herein.

We have set out these facts at length because it is necestary to consider them in determining two issues presented in the case which are—

First, whether the determination of the commissioner that a claim for refund had been filed is final and conclusive.

Second, if the decision of the commissioner is not conclusive, whether an informal claim for refund was in fact filed and made sufficient by the formal claim treated as an amendment thereto.

The plaintiff contends that the decision of the commissioner that an informal claim for refund had been filed and perfected by the one later filed in regular form was final and conclusive. We think it was no more final and conclusive than if he had made a decision that no claim for refund had been filed and for that reason rejected the claim for rebuttal. The decision of the commissioner on such a matter was not a mere administrative act, and even if it had

[fol. 20] been it could be impeached for fraud or mistake. We think it is reviewable in this court on the question of whether it was erroneous under the law, and therefore is not conclusive.

The plaintiff contends that the court does not have all the facts before it upon which the commissioner acted, but the findings show what was considered by a clerk in the office in coming to the conclusion that an informal claim for refund had been filed, and that the decision of this clerk was subsequently approved by the deputy commissioner. We cannot assume that there were any other matters which were taken into consideration. If the plaintiff or its attorney had presented to the commissioner anything further than appears in the findings in the way of making a claim, formal or informal, for this refund, obviously the plaintiff would have it in its power to produce evidence thereof. As it has produced no such evidence, although such evidence would be in its favor if produced, the court under well-settled principles has the right to conclude that no such evidence exists.

The record in the case shows that the commissioner and his officials took unusual pains to advise the plaintiff of its rights and gave it both notice and opportunity in abundant time to avail itself of them. The refund now sought is of taxes paid in December, 1919, and as the law then stood a claim for refund had to be filed by December, 1923. No claim was filed, and in April, 1924, an additional assessment for the year 1919 was made by the commissioner. A claim for abatement of this additional assessment was filed by the taxpayer in May, 1924, but no claim was then made that the amount originally paid was too large. The commissioner, however, in November, 1924, found that the plaintiff had been overassessed for 1919 in the sum of $10,866.43. Plaintiff was advised of this overassessment, but also notified that it could not be allowed as the time for filing a claim had expired. Doubtless with the intention of giving plaintiff and other taxpayers in a similar situation further opportunity to file claims for refund, on March 3, 1925, Congress passed an amendment to the revenue law relating especially to the taxes of 1919, providing in effect that if the taxpayer should before June 15, 1925, file a waiver in respect to such taxes, a claim for refund thereof might be

filed on or before April 1, 1926, thus making a special exception in favor of taxpayers who had failed to file a claim for refund on taxes of 1919 within the time required by law. The plaintiff having taken no action under this provision of the statute for more than two months, the bureau wrote a letter to plaintiff calling attention to the statue and stating it would be necessary that a waiver be filed and enclosing a form of waiver. The plaintiff thereupon executed a waiver and filed it with the department, but still did nothing in the way of filing a claim. In fact it was not until December 11, 1926, that the bureau heard from plaintiff again when its counsel wrote a letter reviewing the correspondence that had passed between the bureau and the plaintiff and stating in effect that it was assumed that the amount of the overassessment would be refunded. This, it will be observed, was over eight months after the limitation had expired for filing claims under the amended statute. It is upon this record that the bureau finally held that an informal claim of refund had been filed in May 23, 1925, when the waiver was filed. In other words, the bureau held [fol. 21] that the filing of the waiver constituted an informal claim for refund under the circumstances, but there was nothing in the circumstances to justify any such conclusion. It was simply a case where the plain provisions of the statute were utterly ignored by the plaintiff.

Upon the question as to whether a claim for refund, informal or otherwise, was filed by the plaintiff within the period of limitations, the facts in the case leave no doubt. Absolutely nothing in the way of a claim for refund was filed by plaintiff until February 19, 1927, about eight months after a claim for refund was barred by the statute of limitations. It may possibly be said that the plaintiff was misled by the letter from the commissioner stating that the claim could not be allowed unless a waiver was filed, and that when the waiver was accordingly filed the plaintiff had the right to believe that the claim would be paid without any further action being taken on its part. But there is no claim that defendant's officials waived the filing of a claim for refund and plaintiff's attorney could hardly have been misled to the detriment of plaintiff by this letter. If the statute of limitations had run a short time after the writing of the letter it possibly might be said that

plaintiff had been prejudiced by it. But the period of limitations did not expire until about ten months after the receipt of this letter and after a reasonable time had expired the failure of the department to take any action on the refund was practically notice to the plaintiff that the commissioner did not intend to allow it under the situation in which it then stood. The plaintiff, instead of taking up the matter again in a short time with the commissioner, delayed until after the statute of limitations had run and then counsel for plaintiff wrote the commissioner a letter in effect stating that it assumed that payment would be made without any further action on plaintiff's part. This, it seems to us, was an inattention to the matter for which no justification can be found in the letters from the commissioner's office, and if the letter of plaintiff's counsel indicating expectation that the refund would be paid constituted an informal claim for refund, we find it was sent after the period of limitations had expired.

It is urged that the claim for refund which was filed long after the statute of limitations had expired may be considered as an amendment perfecting plaintiff's claim. Whether this claim for refund, which was complete in itself and made no reference to any other instrument, could in any event be considered an amendment we are not called upon to determine. In any event, it can not be considered an amendment to something which did not exist and the plaintiff, up to the time the limitation had expired, had made no kind of a claim and filed no statement which could possibly be construed as a claim for refund, either formal or informal, in the sense that the words are used in the statute, or any other. What the plaintiff actually did was to assume that the refund would be paid without the filing of any claim. If there had been any justification for this assumption it might be that the filing of a refund claim was waived, but the record shows clearly, as we think, that there was none. On the contrary, the failure of the commissioner to take any action for months after the filing of the waiver we think was sufficient notice to plaintiff that something further was required on its part. It ought also be said in this connection that plaintiff does not allege that the filing [fol. 22] of a claim for refund was waived, but rests its case upon the theory that neither under the evidence nor

the law can the original decision of the commissioner be reviewed by this court and that this decision is final and conclusive. For the reasons above stated we do not think this position is well founded. Having reached this conclusion we hold that the evidence clearly shows that the commissioner erred in deciding that an informal claim for refund had been filed when in fact no claim for refund of any kind was filed until after the expiration of the period of limitations.

It has been held in a number of cases, and so far with the approval of the Supreme Court, that even where a claim for refund is filed, it must state the grounds of the claim. In most of these cases, like the one at bar, the evidence showed that the plaintiff would have been entitled to the refund had it complied with the provision of the statute with reference to filing the claim which this court considered binding upon it. If we sustain the claim of plaintiff, then, as it seems to us, we disregard the plain provisions of the statute and put the rights of a taxpayer which has filed no claim at all on a higher basis than those of one which has filed a claim but through mistake of law or some other error has failed to put it in proper form. We do not think the commissioner can properly hold that letters or papers which make no mention of a claim for refund and use no language which can be construed as making such a claim, constitute in fact an informal claim. Such a construction would practically nullify the statute.

The defendant as before stated, sets up a counterclaim and seeks to recover the amount of the payment made by the commissioner on the plaintiff's claim for refund. In support of the counterclaim it is urged that the commissioner had no authority to make this payment, as no claim for refund was filed until after the expiration of the period of limitations and the payment was not made until still later. We do not find it necessary to determine whether the commissioner had authority to pay the refund or any part of it after the statute of limitations had run. The existence of plaintiff's claim did not depend upon the filing of a claim for refund. The claim arose from the fact that plaintiff had overpaid its tax. The statutory requirement that a claim for refund should be filed and also the limitations on the time when suit might be brought are simply

conditions required by the Sovereign Government to exist before suit could be begun on the claim and have nothing to do with the validity of the claim. Nor did the validity of plaintiff's claim at all depend on the authority of the commissioner to make the payment. All of these matters are merely statutory provisions which at most only pertain to the right of the plaintiff to bring suit and which Congress could repeal or change at any time, and thereby without in any way affecting the nature of the claim itself enable plaintiff to recover by suit the balance of the overpayment. The situation is analogous to a case where a person holding a claim which is valid but barred by the statute of limitations receives payment from the party against whom the claim is held. The statute barred the remedy but did not extinguish the liability. Plaintiff received this payment on a claim which had not been extinguished, and having so received it, the amount received became its property. We know of no theory upon which the Government [fol. 23] can claim that this money is due it. The fact that the plaintiff could not have recovered it by suit, as we have shown, does not defeat its right to keep it which is founded on a just claim against the Government. The counterclaim therefore can not be sustained.

It will be observed that a peculiar situation has arisen in the case. We have held that the Government was prevented from applying any of the overpayment upon the taxes of previous years by the statute of limitations. We have also held that the amount which the Government undertook to so apply could not be recovered by plaintiff by reason of the statutory provisions requiring the filing of a claim for refund within a given time. But while the court has felt constrained to apply these arbitrary rules of statutory law the final result is that abstract justice is done in that the Government has received the amount of the taxes due it in all the period involved in the case; and the plaintiff has paid no more than it justly owed and is permitted to retain the balance of its overpayment after these taxes have been settled. While the court is not influenced in the least by this result in coming to its decision, it can view the outcome with entire equanimity.

The petition and counterclaim must be dismissed, and it is so ordered.

WILLIAMS, Judge, and BOOTH, Chief Justice, concur.

DISSENTING OPINION

LITTLETON, Judge, dissenting:

I think the plaintiff should recover. If it made an informal claim the commissioner had a right to make the refund. The commissioner held that an informal claim had been made on May 23, 1925, and allowed the refund of $10,866.43, which was an overpayment found to have been made on the original return, and at no time did he ever change his decision.

It appears from the exhibits filed that the plaintiff made a return for the fiscal year ending January 31, 1919, showing a tax of $57,871.16, which was duly paid. On the April, 1924, special list, the commissioner made a jeopardy assessment of an additional tax of $167,294.59 for the fiscal year 1919. Plaintiff filed a claim for abatement. This claim is not in evidence. Thereafter an internal revenue agent made an investigation and an examination of the plaintiff's records and, on May 31, 1924, made a report to the commissioner of the result of his examination with reference to plaintiff's tax liability for the fiscal year 1919. As a result of the report of the revenue agent, which was made the basis of the commissioner's final determination, the commissioner finally determined that the correct amount of the total tax due for the fiscal year 1919 was $47,004.73, resulting in a total overassessment of $178,161.02, which overassessment was made up of $10,866.43 of the tax reported and paid on the original return and the total of the jeopardy assessment of $167,294.59 which had not been paid. On November 19, 1924, the commissioner mailed plaintiff a notice of this determination and advised it that the total of the additional jeopardy assessment would be abated, but that inasmuch as no claim for refund had been filed within the time required by section 281 of the [fol. 24] revenue act of 1924 the overassessment of $10,866.43 could not be refunded or an overassessment allowed in respect thereon. In accordance with this determination the commissioner on or about November 19, 1924, prepared a certificate of overassessment and approved a schedule of overassessment of $167,294.59, being the total

overassessment of $178,161.02 less $10,866.43 which at that time was not refundable.

Subsequently Congress passed the act of May 3, 1925, amending section 281 (e) of the revenue act of 1924. This amendatory act provided that "If the taxpayer has on or before June 15, 1925, filed * * * a waiver in respect of the taxes due for the fiscal year 1919, * * * credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed * * * on or before April 1, 1926 * * *." Thereupon the commissioner, on May 16, 1925, sent to the plaintiff a notice on a form prepared for that purpose in which he referred to his determination of an overassessment for 1919 and stated: "It appears that the overassessment can not now be allowed due to the limitation of time for allowance thereof provided by section 281 of the revenue act of 1924, unless an income and profits tax waiver is filed on or before June 15, 1925, as provided by an act of Congress dated March 3, 1925, amending section 281 (e) of the revenue act of 1924." With this notice the commissioner sent the plaintiff two waivers and suggested that one of them be executed and returned. The waiver was executed by plaintiff on May 22, 1925, and its counsel returned the same to the commissioner with a letter stating: "In accordance with your request, we enclose herewith waiver." This letter and the waiver were received and filed by the Bureau of Internal Revenue on May 23, 1925. The Bureau of Internal Revenue indorsed upon the letter of plaintiff's counsel returning the waiver as follows: "Inferential demand for the refund upon basis of schedule sent taxpayer under date of November 19, 1924 (IT:CR:A:JML). Rules and Regulations. Mulligan." A further endorsement appears on this letter as follows: "Approved by Mr. Mulligan and Mr. Sherwood for scheduling as is. O. Allen. 4/4/27." On February 5, 1927, the bureau executed another certificate of overassessment for $10,866.43, and the certifications set forth in Finding 10 were made on the bureau's copy thereof, and the correspondence set forth in the findings of fact took place. On March 8, 1927, a schedule of overassessment for the $10,866.43 was signed by the commissioner and transmitted to the collector at New York. The collector made his report to the commissioner and thereafter

the commissioner sent plaintiff the certificate of overassessment for the $10,866.43 showing that $9,846.06 thereof had been credited against a 1917 tax and the balance of $1,020.37 refunded, together with $442.62 interest. The bureau wrote on this certificate the following: "Waiver filed May 23, 1925. Refund claim filed May 23, 1925."

On June 3, 1927, counsel for plaintiff wrote the commissioner a letter with reference to the overpayment of $10,866.43 calling his attention to the fact that the tax for 1917, against which $9,846.06 of the overpayment had been credited, was barred by the statute of limitation at the time the credit was made and that the entire amount should be refunded, and asking that this be done. On October 26, [fol. 25] 1927, the commissioner replied and after conceding that the credit against the 1917 tax was made after the expiration of the statutory period of limitation within which the 1917 tax could be collected, and after referring to the decision of the Supreme Court in New York and Albany Lighterage Company v. United States, 273 U. S. 346, stated: "You are advised that the question of the proper action to be taken in cases where an overassessment for one year has been credited against an additional tax for another year after the expiration of the statutory period of limitation on the collection of tax for such year is now under consideration by the general counsel of the bureau in connection with the position taken by the Government in the case of the Peerless Paper Box Company v. Routzahn * * *. As soon as a decision is reached on this question you will be further advised." No further advice was given plaintiff and it instituted this suit to recover the portion of the the overpayment allowed which had been credited against an outlawed 1917 tax. The petition was filed January 7, 1928, and a general traverse was entered February 4, 1928. The case was referred to a commissioner for hearing and report. The hearing was held before the commissioner who filed his report April 4, 1929. Plaintiff filed its brief May 18, 1929. Thereafter, on May 24, 1929, the defendant filed a counterclaim insisting, for the first time, that no claim had been made in time, and asking for the recovery of that portion of the overpayment and interest for 1919 that had been refunded.

In view of all the facts and circumstances, I am of opinion that the Commissioner of Internal Revenue was justified in holding that the execution and filing of the waiver with the letter dated May 22, which waiver and letter were received and filed by the bureau on May 23, 1925, constituted an informal claim for refund made in time, which informal claim was perfected by a formal claim later filed. This view does not give the taxpayer who has made an informal claim, and who perfects such claim by the filing of a formal one, any greater right than a taxpayer who has filed a claim on the form prescribed by the commissioner's regulations which fails to state the grounds for the claim. The general rule is that an informal claim may be perfected by a formal claim and that a claim filed on the proper form, but which does not state the grounds for the refund, may also be perfected by an amendment specifically setting forth the grounds or that this defect may be waived by the commissioner. For these reasons I think the counterclaim should be denied and that judgment should be given for the plaintiff.

The situation here is different from the ordinary case involving the sufficiency of the grounds of a claim, such as was before the court in Tucker v. Alexander, 275 U. S. 228, or where the plaintiff has taken no steps whatever toward obtaining a refund, as was the case in Kings County Savings Institution v. Blair, 116 U. S. 200. The allowance of the refund by the commissioner is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake, and the fact of fraud or mistake must be clearly established by competent evidence. United States v. Kaufman, 96 U. S. 567; United States v. Savings Bank, 104 U. S. 728. There is here no question of fraud. The burden is upon the Government to establish that the Commissioner of Internal Revenue made a mistake [fol. 26] when he held that an informal claim had been made. In my opinion the record does not sustain this claim of the defendant. The statute does not specify the form or contents of a claim for refund upon which the commissioner may act. He has considerable discretion in the matter. The purpose of requiring the claim is either definitely to end the controversy if none is filed or to keep the matter of the tax liability alive by the filing, and to give

the commissioner the right to pay the amounts erroneously collected. The decision of the commissioner as to the sufficiency of the claim under the peculiar circumstances existing in the particular case should be given considerable weight. In cases such as this any documents filed by the taxpayer in an effort and for the purpose of obtaining a refund, and which satisfy the commissioner that the taxpayer is asking for a refund of an admitted overpayment, are sufficient under the statute to constitute an informal claim that might be perfected as this claim was.

GRAHAM, Judge, concurs.

[fol. 27] VII. JUDGMENT

At a Court of Claims held in the City of Washington on the 14th day of April, A. D., 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the Court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

The Court further decides, as a conclusion of law, that the defendant is not entitled to recover on its counterclaim, and the counterclaim is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this court, the amount thereof to be ascertained by the clerk and collected by him according to law, which amount is found to be $44.52.

[fol. 28] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 35,204. Court of Claims. Term No. 282. Bonwit Teller & Company, petitioner, vs. the United States for the cost of printing the record in this exhibit thereto. Filed July 9, 1930. File No. 35.204.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILE
AUG 15
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 282.

BONWIT TELLER & COMPANY, *Petitioner*,
vs.
THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(The Jurisdiction Included.)

ARTHUR B. HYMAN,
Counsel for Petitioner.

Washington, D. C.,
August 9, 1930.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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BONWIT TELLER & COMPANY, *Petitioner,*

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(The Jurisdiction Included.)

I.

THE OPINIONS OF THE COURT BELOW.

The opinions of the Court of Claims were rendered April 14, 1930, and are not yet reported. They are printed at pages 18-25 and 26-30 of the Record.

II.

JURISDICTION.

1. The statutory provision believed to sustain jurisdiction is Sec. 3(b) of the Act of February 13, 1925,

Ch. 229, 43 Stat. 939; U. S. C. Title 28, Section 288(b).

2. The judgment sought to be reviewed was entered April 14, 1930 (R. 30). The petition for certiorari was filed July 9, 1930 (R. 30).

3. The suit in which the judgment is sought to be reviewed was instituted in the Court of Claims to recover income and profits taxes erroneously collected (R. 5). Judgment was there rendered dismissing the petition.

4. Cases believed to sustain the jurisdiction are:

United States vs. Jones, 119 U. S. 477;
Phelps vs. United States, 274 U. S. 341;
Jacob Reed's Sons vs. United States, 273 U. S. 200;
Fred T. Ley & Co. vs. United States, 273 U. S. 386.

III.

STATEMENT OF THE CASE.

Suit was instituted in the Court of Claims to recover against the United States the sum of $10,866.43 which had been determined and certified by the Commissioner of Internal Revenue as an overpayment of taxes for the year 1919 (R. 16-17). The question involved is whether, in such a suit, the action of the Commissioner in allowing the claim is binding upon the United States where neither fraud nor mistake is asserted.

The petitioner's income tax return for the fiscal year ended January 31, 1919, was filed on or about the 14th day of July, 1919 (Special finding 3, R. 13). Thereafter upon audit of the return the Commis-

sioner found and so advised the taxpayer under date of November 19, 1924, that its tax had been overassessed in the sum of $10,866.43 (Special finding 4, R. 13). The period of limitation then in effect had run against the allowance of a refund, but the statute was subsequently amended (Act of March 3, 1925; Ch. 435, 43 Stat. 1115) so as to permit such allowance.

In accordance with that amending Act, on May 16, 1925, the Commissioner wrote the taxpayer that the refund could not be allowed "unless an income and profits tax waiver is filed on or before June 15th, 1925." Thereupon, on May 22, 1925, the taxpayer filed the required waiver, with a letter saying, "In accordance with your request, we enclose you herewith waiver" (Special finding 5, R. 14). Still later, on February 9, 1927, the Commissioner again wrote taxpayer in respect to the matter, requesting a formal claim executed on the departmental Form 843. This form duly executed was filed on or about February 19, 1927 (Special findings 6-8, R. 15-16). The Commissioner treated the waiver and letter of May 22, 1925, in connection with the prior correspondence and proceedings, as an informal or defective claim for refund, perfected by the formal claim on Form 843, and allowed the claim in the amount of $10,866.43 (Special findings 9-10, R. 16-17). On or about March 8th, 1927, the Commissioner duly approved and scheduled to the Collector of Internal Revenue a certificate of overassessment, No. 990988, in petitioner's favor, and on or about May 12, 1927, caused the original certificate to be delivered to the petitioner (Special finding 11, R. 17). A copy of that certificate was annexed to the petition in the Court below as Exhibit "A" (R. 8-9).

The Collector of Internal Revenue, after receiving the certificate of overassessment, certified the same as an overpayment by the petitioner for its fiscal year ended January 31, 1919. He thereafter credited $9,846.06 of the amount allowed on the schedule against an additional tax assessed for 1917 and a check for $1,462.99, which included the balance of the overassessment of $1,020.37 and interest thereon in the amount of $442.62, was subsequently issued in favor of the petitioner (Special finding 11, R. 17). The petitioner refused the check and never presented it for payment but has held it in its possession and has offered to apply it upon its claim, if the defendant so desired and agreed, and duly protested against the application of any part of the refund upon its tax for the year 1917 on the ground that the said tax for 1917 was barred by the Statute of Limitations (Special finding 11, R. 17).

Petitioner brought this suit in the Court of Claims to recover the entire amount of the overpayment determined and allowed by the Commissioner of Internal Revenue. The United States filed a general traverse (R. 9) but subsequently and after the completion of the testimony and filing of petitioner's brief, by permission of the Court, filed a counterclaim seeking to recover the said sum of $1,402.99, the balance remaining after the deduction of the taxes of 1917 (R. 11). The United States perforce abandoned its claim of right to deduct the taxes of 1917 from the amount of the overpayment for 1919 in view of the decisions in *Bowers vs. New York & Albany Lighterage Co.*, 273 U. S. 346; *Peerless Paper Box Mfg. Co. v. Routzahn*, 22 Fed. (2d) 459; and *Brady v. U. S.*, 24 Fed. (2d) 205; and Section 1106 of the

Revenue Act of 1926, Ch. 27, 44 Stat. 113; and sought to defeat recovery by an attack upon the Commissioner's allowance of the claim, asserting for the first time that a proper claim for refund had not been filed and that therefore the Commissioner erred in his determination.

Treasury Department Regulations (T. D. 4265-6) provide that if an informal or defective claim was filed it could be perfected by a formal claim if the latter was filed on or before May 1, 1929.

The questions in dispute are:

1. Whether the Commissioner's determination of the overpayment and the allowance of the claim are binding upon the United States where neither fraud nor mistake is asserted.

And if that question be answered in the negative,

2. Whether the Commissioner's determination that the documents on file with him on May 22, 1925, constituted an informal claim for refund, was erroneous in law.

The Court of Claims by a divided vote of three to two held that the determination of the Commissioner was not final and conclusive and that his allowance of the claim was erroneous in law (R. 18, 26, 30).

IV.

SPECIFICATION OF ERRORS.

1. The Court of Claims erred in holding that the determination of the Commissioner of Internal Revenue of an overpayment of taxes and his allowance of a claim for refund were not binding upon the United States, there being no mistake or fraud claimed or proved.

2. The Court of Claims erred in holding that it had the power to review the allowance by the Commissioner of Internal Revenue and to determine the sufficiency of the claim for refund filed by the petitioner, no fraud or mistake being claimed.

3. The Court of Claims erred in holding as a matter of law that the claim for refund filed with the Commissioner of Internal Revenue was insufficient in law.

4. The Court of Claims erred in dismissing the petition.

V.

ARGUMENT.

The Allowance of a Claim for Refund by the Commissioner of Internal Revenue is Binding Upon the United States Until by Proper Action it is Impeached for Fraud or Mistake.

The Commissioner of Internal Revenue allowed petitioner's claim for refund. In this suit to recover upon such allowance, the United States seeks to repudiate the action of the Commissioner. It is not disputed that the refund is allowable on the merits. The defendant's sole attack is upon the sufficiency of the claim for refund.

The Commissioner of Internal Revenue is vested with exclusive authority on behalf of the United States "to remit refund and pay back all taxes erroneously or illegally assessed or collected * * *". R. S. Sec. 3220; Ch. 27, 44 Stat. 115; U. S. C. Title 26, Sec. 149. That section and other pertinent statutory provisions are set forth in the appendix hereto.

The Commissioner's allowance of a claim is in the

nature of an account stated and is binding upon the United States unless fraud or mistake is proved by competent evidence. *United States vs. Savings Bank*, 104 U. S. 728; *United States vs. Kaufman*, 96 U. S. 567. See also *United States vs. Detroit Steel Products Co.*, 20 Fed. (2d) 675, 677, and *Peerless Paper Box Manufacturing Co. v. Routzahn*, 22 Fed. (2d) 459.

To the same effect and directly in conflict with the ruling in this case are the following decisions of the Court of Claims:

First Natl. Bank of Greencastle vs. U. S., 15 Ct. Cls. 225;
Woolner vs. U. S., 13 Ct. Cls. 355;
Savings Bank of Pittsburgh vs. U. S., 16 Ct. Cls. 335;
Nixon vs. U. S., 18 Ct. Cls. 448;
Sybrandt vs. U. S., 19 Ct. Cls. 461.

The United States made no claim of, and offered no proof to establish, fraud or mistake in the allowance of the claim in this case. The adverse decision of the majority of the Court of Claims was upon the ground that there was a misconstruction of law by the Commissioner (R. 22). The disputed ruling of the Commissioner was that the documents filed May 22, 1925, taken in connection with the prior correspondence and proceedings, constituted an informal claim for refund. This was not a misconstruction of law, since it was not a question of law. It was a question of fact, the decision of which insofar as the United States was concerned was confided by the statute to the Commissioner. The Commissioner's determination has never been revoked and the certificate has not been recalled nor has it been attacked in any proceeding for fraud or mistake.

If the Commissioner's ruling that the documents on file on May 22, 1925, constituted an informal claim for refund is not open to review in this proceeding, there is not any other question open. It is not disputed that the informal claim was perfected by the formal claim filed February 19, 1927. The whole procedure was, therefore, valid and proper under the terms of Treasury Decision 4266, and petitioner was entitled to judgment.

We incorporate herein by reference the minority opinion of the Court of Claims (R. 26-30).

The Court of Claims Erred in Holding as a Matter of Law That No Proper Claim for Refund Was Filed.

Even if the Commissioner's certificate of overpayment and allowance of the claim for refund were open to review, there was not any error of fact or law which invalidated the determination of the Commissioner that this amount was due to the petitioner. The only fault claimed by the defendant is the holding by the Commissioner that an informal claim for refund had been filed by May 22, 1925.

The statute does not define a "claim for refund" but leaves the matter to the regulations of the Commissioner and the Secretary of the Treasury. There are formal claims for refund prepared strictly in accordance with the regulations and informal or defective claims which fail to meet one or more of the detailed requirements of the regulations. The existence and effect of the latter have been long recognized—certainly since 1884, when they were discussed in 14 Op. Atty. Gen'l. 814. The whole subject was elaborately considered in Law Opinion 1116,

published in Internal Revenue Cumulative Bulletin III-1, at pages 350-359. Under the terms of Treasury Decision 4266, approved by the Secretary of the Treasury March 27, 1929, informal or defective claims were held to be sufficient to toll the statute of limitations if perfected by formal claims filed prior to May 1, 1929. This Treasury Decision was a statement of a long standing practice of the Bureau of Internal Revenue.

The purpose of the statutory requirement for filing a claim for refund is to give the Commissioner of Internal Revenue notice of the existence of the claim and of the grounds upon which the claim is made.

In this case the Commissioner had full notice; he himself had already ascertained the overpayment and had invited the filing of a waiver so that a refund could be made under the terms of the amended statute. The documents on file, therefore, constituted a valid claim for refund in full compliance with the statute and were so treated by the Commissioner.

Any defect in the form or contents of the claim for refund was merely a failure to comply with the regulations. Such a procedural defect could be, and in this case was, waived by the Commissioner. *Tucker vs. Alexander,* 275 U. S. 228; See also *Art Metal Construction Company vs. United States,* 35 Fed. (2d) 379, 380-381; *Zeller vs. United States,* 35 Fed. (2d) 870, 872; and *Swift & Company vs. United States,* 67 Ct. Cls. 322, 331.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the status of

the certificate of overpayment by the Commissioner of Internal Revenue may be definitely determined and settled and that an error in the construction and application of the statute may be corrected; and to such end that a writ of certiorari should be granted and this Court should review the decision of the Court of Claims and finally reverse it.

Respectfully submitted,

ARTHUR B. HYMAN,
Counsel for Petitioner.

Washington, D. C.,
August 9, 1930.

APPENDIX.

R. S. Sec. 3220, Ch. 27, 44 Stat. 115, as amended and in force at the date the claim for refund was allowed, provided:

> "Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926, the Commissioner of Internal Revenue, subject to regulations, prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected, * * *."

The pertinent provisions of Section 284 of the Revenue Act of 1926 (Chap. 27, 44 Stat. 66) are:

> "(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

"(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * * * * *

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. * * *"

Section 319 of the Revenue Act of 1926 relates to estate taxes and is not pertinent here.

Section 281 (e) of the Revenue Act of 1924 (the act prior to the Revenue Act of 1926) as amended by the Act of March 3, 1925, Ch. 435, 43 Stat. 1115, provided:

> "If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. * * *"